Supreme Court, U.S.
FILED
MAY 28 2002

No. 01-1586

IN THE

Supreme Court of the United States

LYN EVERHART,

Petitioner,

v.

ALLAMERICA FINANCIAL LIFE INSURANCE COMPANY, doing business as STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT CERTIORARI

PAUL E. B. GLAD *
SONIA RENEE MARTIN
SONNENSCHEIN NATH & ROSENTHAL
685 Market Street
6th Floor
San Francisco, CA 94105
(415) 882-5000

* Counsel of Record

Attorneys for Respondent Allmerica Financial Life Insurance Company, dba State Mutual Life Assurance Company of America

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

ISSUE PRESENTED

Does section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"), permit suits for plan benefits against plan insurers based solely on their status as "insurers"?

TABLE OF CONTENTS

	Page
ISSUE PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
A. The Policy, The Plan, And Charles Everhart	3
B. Petitioner's Settlement With The Plan's Administrator And Release Of All ERISA Claims Against The Plan And Its "Administrators"	3
C. Everhart's Dispute With Allmerica	4
ARGUMENT	5
I. EVERHART'S REQUEST FOR AN ADVISORY OPINION SHOULD BE REJECTED	6
A. The Only "Split" Among The Circuits Concerns The Propriety Of Benefits Suits Against Plan Administrators, An Issue Not Presented In This Case	7
B. No Court of Appeal Has Held That ERISA Permits Benefits Suits Against Plan Insurers Based Solely On Their Status As "Insurers"	8
II. ERISA DOES NOT PERMIT SUITS FOR BENEFITS AGAINST INSURERS WHO ARE NOT PLAN ADMINISTRATORS	11

TABLE OF CONTENTS—Continued

Page

A. Neither The Text Of ERISA, Nor Case Law, Permits Suits For Benefits Against Plan Insurers Based Solely On Their Status As "Insurers" 12

B. Permitting Suits Against Plan Insurers For ERISA Benefits Would Frustrate the Legislative Intent Underlying ERISA 16

CONCLUSION 19

APPENDICES 1a

TABLE OF AUTHORITIES

CASES	Page
Adkins v. Unum Provident Corp. 191 F. Supp. 2d 956 (M.D. Tenn. 2002)	13
Auto Club Ins. Assn v. Safeco Life Ins. Co. 833 F. Supp. 637 (W.D. Mich. 1993)	13
Cisneros v. UNUM Life Ins. Co. of Am. 134 F.3d 939 (9th Cir. 1998)	9
Cohen v. Equitable Life Assurance Society 196 Cal. App. 3d 669 (1987)	13
Crawford v. Exxon Corp. 851 F. Supp. 242 (M.D. La. 1994)	13
Curcio v. John Hancock Mutual Life Insurance Company 33 F.3d 226 (3d Cir. 1994)	8
Daniel v. Eaton Corp. 839 F.2d 263 (6th Cir.), *cert. denied,* 488 U.S. 825, 109 S.Ct. 76 (1988)	7
Flast v. Cohen 392 U.S. 83, 88 S. Ct. 1942 (1968)	11
Forsyth v. Humana, Inc. 114 F.3d 1467 (9th Cir. 1997), *affd sub nom, Humana, Inc., v. Forsyth,* 525 U.S. 299, 119 S. Ct. 710 (1999)	9, 13
Garren v. John Hancock Mut. Life Ins. Co. 114 F.3d 186 (11th Cir. 1997)	7

TABLE OF AUTHORITIES—Continued

Page

Gelardi v. Pertec Computer Corporation
761 F.2d 1323 (9th Cir. 1985) 2, 7, 12

Gibson v. Prudential Life Ins. Co.
915 F.2d 414 (9th Cir. 1990) 7, 13

Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.
530 U.S. 238, 120 S. Ct. 2180 (2000)..... 15

Holland v. Bank of America
673 F. Supp. 1511 (S.D. Cal. 1987)..... 13

Holloway v. HECI Exploration Co. Employee's Profit Sharing Plan
76 B.R. 563 (N.D. Tex. 1987)..... 13

Horan v. Kaiser Steel Retirement Plan
947 F.2d 1412 (9th Cir. 1991) 14

Hupp v. Experian Corp.
108 F. Supp. 2d 1008 (N.D. Ill. 2000) 13

Jass v. Prudential Health Care Plan, Inc.
88 F.3d 1482 (7th Cir. 1996) 7

Kearney v. Standard Ins. Co.
175 F.3d 1084, *cert. denied*, 120 S.Ct. 398 (9th Cir. 1999) 13

Lambert v. Pacific Mut. Life Ins. Co.
211 Cal. App. 3d 456, *review denied*, (1989) 13

Landgraf v. USI Film Products
511 U.S. 244, 114 S. Ct. 1483 (1994)..... 10

TABLE OF AUTHORITIES—Continued

	Page
Layes v. Mead Corp. 132 F.3d 1246 (8th Cir. 1998)	7
Lee v. Burkhart 991 F.2d 1004 (2d Cir. 1996)	7
Mackey v. Lanier Collection Agency & Service, Inc. 486 U.S. 825, 108 S. Ct. 2182 (1988)	12
Madden v. ITT Long Term Disability Plan for Salaried Employees 914 F.2d 1279 (9th Cir. 1990), *cert. denied*, 498 U.S. 1087, 111 S.Ct. 964 (1991)	7, 12
Massachusetts Mut. Life Ins. Co. v. Russell 473 U.S. 134, 105 S. Ct. 3085 (1985)	15
Menhorn v. Firestone Tire & Rubber So. 738 F.2d 1496 (9th Cir. 1984)	13
Murphy v. Wal-Mart Assocs. Group Health Plan 928 F. Supp. 700 (E.D. Tex. 1996)	13
Pilot Life Ins. Co. v. Dedeaux 481 U.S. 41, 107 S. Ct. 1549 (1987)	17
R.A.V. v. St. Paul 505 U.S. 377, 112 S. Ct. 2538 (1992)	10
Riordan v. Commonwealth Edison Co. 128 F.3d 549 (7th Cir. 1997)	12
Roeder v. Chemrex Inc. 863 F. Supp. 817 (D. Wis. 1994)	13

TABLE OF AUTHORITIES—Continued

Page

Ross v. Rail Car America Group Disability Income Plan
285 F.3d 735 (8th Cir. 2002) 7

Spain v. Aetna Life Ins. Co.
13 F.3d 310 (9th Cir. 1993) 12

Thomason v. Aetna Life Ins. Co.
9 F.3d 645 (7th Cir. 1993) 17

U.S. v. Fruehauf
365 U.S. 146, 81 S. Ct. 547 (1961)..... 11

United States v. Stanley
483 U.S. 669, 107 S. Ct. 3054 (1987)..... 10

Ward v. Management Analysis Company Employee Disability Benefit Plan
135 F.3d 1276 (9th Cir. 1998),
overruled on other grounds,
526 U.S. 358, 119 S. Ct. 1380 (1999)..... 9

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

Page

United States Code

Title 29, Section 1001 *et seq.* i
Title 29, Section 1002(1) 7
Title 29, Section 1109(a) 14
Title 29, Section 1132 12
Title 29, Section 1132(1) 15
Title 29, Section 1132(a)(1)(B) ..... *passim*
Title 29, Section 1132(d)(2) 14
Title 29, Section 1444(b)(1) 16

Supreme Court Rule 10 6

IN THE

Supreme Court of the United States

No. 01-1586

LYN EVERHART,

Petitioner,

v.

ALLAMERICA FINANCIAL LIFE INSURANCE COMPANY, doing business as STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT CERTIORARI

STATEMENT OF THE CASE

This petition arises from Petitioner Lyn Everhart's ("Everhart's") attempt to recover additional ERISA benefits under the employee benefit plan (the "Plan") covering her deceased husband, Charles Everhart. The Plan was sponsored and administered by Mr. Everhart's employer, Credence Systems Corporation ("Credence"), and insured by Defendant/Respondent Allmerica.[1] Following her husband's

[1] The Respondent has been misnamed in this lawsuit. Petitioner sued "Allmerica Financial Life Insurance Company d/b/a State Mutual Life

death, Allmerica paid petitioner the full death benefits purchased from Allmerica based upon the representations made by Mr. Everhart. Petitioner settled with the Plan and its administrator for an additional $230,000. Petitioner then sued the plan's insurer, Allmerica, for more benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

On cross-motions for summary judgment, Allmerica and Everhart asked the district court to determine, among other things, whether Everhart had standing to sue Allmerica for ERISA benefits under the Plan. Based on the Ninth Circuit's ruling in *Gelardi v. Pertec Computer Corporation*, 761 F.2d 1323 (9th Cir. 1985), the district court granted summary judgment in Allmerica's favor on the ground that Everhart's claim for plan benefits could only have been brought against the Plan as an entity, with which she has already settled.

The Ninth Circuit affirmed judgment in Allmerica's favor on the ground that Everhart may not sue an insurer (who is not a plan administrator) for ERISA benefits. The Court of Appeal noted that it need not address the split among Courts of Appeal regarding the propriety of suits for benefits against plan administrators because Everhart had admitted that Allmerica was not the Plan's administrator and, in any event, had released all claims against the Plan's "administrators."

STATEMENT OF FACTS

The facts in this case are straightforward and undisputed. Indeed, they are substantially drawn from a Stipulation of the Parties as to Material Facts.

Assurance Company of America." Respondent's name is actually First Allmerica Financial Life Insurance Company. Throughout this brief, Respondent is referred to as "Allmerica."

A. The Policy, The Plan, And Charles Everhart

Allmerica issued to Credence's employee benefit plan a group life insurance policy (the "Policy"). The Plan was administered by Credence.[2] The parties have admitted that the Plan and the Policy are governed by ERISA.

Charles Everhart was a Credence employee who participated in the Plan. The terms of the Policy entitled Mr. Everhart's designated beneficiary to a death benefit comprised of twice his annual earnings. According to the representations contained in the Policy's application, Mr. Everhart's annual earnings were $84,800. On December 5, 1994, Mr. Everhart died.

Shortly after Mr. Everhart's death, a dispute arose with respect to the identity of Mr. Everhart's designated beneficiary for the purposes of distributing his death benefits. Once that dispute was resolved, Allmerica promptly paid Everhart $170,000 plus interest as the "benefits payable under the Policy." Pursuant to the terms of the Policy, this amount represented twice Mr. Everhart's annual earnings, as stated in the Policy's application, rounded to the nearest thousand.

B. Petitioner's Settlement With The Plan's Administrator And Release Of All ERISA Claims Against The Plan And Its "Administrators"

Following Mr. Everhart's death, a dispute also arose as to whether Credence owed Mr. Everhart unpaid benefits and compensation at the time of his death. That dispute was

---

[2] As petitioner conceded in her Reply Brief filed in the Ninth Circuit: "The summary plan description specifically identifies the plan administrator as 'Credence Systems Corporation,' not Allmerica." (Respondent's Appendix B, p. 21a.) A copy of Everhart's Reply Brief is reproduced in Respondent's Appendix B.

resolved through settlement. In return for a $230,000 payment from Credence, Everhart released all ERISA claims against Credence's "*employer sponsored employee benefit and welfare benefit plans*, trustees and *administrators* of such employee benefit plans, employees, contractors and assigns." (Emphasis added).[3] Specifically, the Release provided as follows:

> Everhart understands and agrees that in further consideration of the foregoing she is waiving any rights she may have had, now has, or in the future may have to pursue any and all remedies available to her under any employment-related causes of action, including without limitation, claims for breach of contract, breach of the covenant of good faith and fair dealing, fraud, claims under the Employee Retirement Income Security Act of 1974, claims for employee benefits, and any other laws and regulations relating to her husband's employment or compensation.

(*Id.*)

C. Everhart's Dispute With Allmerica

After receiving the $202,829.79 benefits payment from Allmerica and releasing all ERISA claims against the Plan and its administrators, Everhart sought further payment from Allmerica.

Everhart informed Allmerica that, although Mr. Everhart represented his annual earnings as $84,800, her investigation had revealed that Mr. Everhart's earnings had been misrepresented and that she believed his actual annual earnings were $240,000. Accordingly, Everhart demanded payment of $310,000, the difference between $170,000 and

---

[3] A copy of the Release is reproduced in Respondent's Appendix A.

the $480,000 to which Everhart claimed she was entitled. Allmerica declined further payment on the ground that it had paid all benefits due under the terms of the Policy. In response, Everhart filed the instant suit against Allmerica for recovery of ERISA benefits.

As the district court and the Court of Appeals held, Everhart has no avenue for further recovery against Allmerica. Given that Everhart has settled with and released all claims for additional benefits against the Plan and its administrators, Allmerica was entitled to summary judgment. This holding is consistent with the plain text of ERISA and a national body of case law.

ARGUMENT

Contrary to the fundamental assumption underlying Everhart's petition, no Circuit Court of Appeal has ever held that a suit for plan benefits is proper against a plan's insurer based solely on its status as an insurer. Rather, as the Ninth Circuit's majority opinion correctly observed, the only "split" in the case law concerns whether ERISA permits suits for benefits against insurers in their capacity as plan *administrators*. Because Credence was the Plan administrator and petitioner has released all claims against the Plan's administrators, this case presents no occasion to resolve any purported "conflict" among the Circuits concerning the propriety of ERISA suits against plan administrators. Petitioner's request for an advisory opinion on this issue should be denied

In any event, the district court and the Court of Appeals properly concluded that petitioner possesses no viable claim for plan benefits against Allmerica. Neither the text of ERISA, nor existing case law, permits a suit for benefits against an insurer who is not a plan administrator. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Since Everhart

has settled with and released the plan and its administrator from all claims for additional benefits, she is precluded from further recovery. Moreover, petitioner's proposed distinction between insured and "self-funded" plans is not supported by the text of ERISA and would frustrate the legislative goals of providing clear and expeditious remedies under ERISA by encouraging duplicative suits for the recovery of ERISA benefits.

For the following reasons, respondent respectfully requests that the Court deny this Petition for Writ of Certiorari.

I. EVERHART'S REQUEST FOR AN ADVISORY OPINION SHOULD BE REJECTED

The Supreme Court Rules are clear that a Petition for Writ of Certiorari "is not a matter of right, but of judicial discretion." Supreme Court Rule 10. In that spirit, "[a] petition for writ of certiorari will be granted only for compelling reasons." *Id.* The Supreme Court Rules set out specific circumstances in which review may be appropriate. In an attempt to satisfy the requirements for review by certiorari, Everhart's petition is premised entirely upon an imaginary "three way split" among the Circuit Courts of Appeal concerning the universe of proper defendants in suits for plan benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

Petitioner, however, has identified no case *holding* that a suit for plan benefits is proper against a plan's insurer based solely on its status as the plan's insurer. The only "split" among the Courts of Appeal concerns the propriety of a suit for benefits against a plan "administrator," as opposed to the plan as an entity. Because Everhart did not sue the plan or its administrator, however, this distinction has no bearing on the outcome of this case. The petition, therefore, seeks an advisory opinion and should be denied.

A. The Only "Split" Among The Circuits Concerns The Propriety Of Benefits Suits Against Plan Administrators, An Issue Not Presented In This Case

In *Gelardi v. Pertec Computer Corporation*, 761 F.2d 1323, 1324 (9th Cir. 1985), the Ninth Circuit held that "ERISA permits suits to recover benefits only against the Plan as an entity." *See also Gibson v. Prudential Life Ins. Co.*, 915 F.2d 414, 415 (9th Cir. 1990); *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1287 (9th Cir. 1990), *cert. denied*, 498 U.S. 1087, 111 S.Ct. 964 (1991). The Second and Seventh Circuits have followed *Gelardi*. *See Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993) ("ERISA permits suits to recover benefits only against the Plan as an entity." (*quoting Gelardi*)); *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1490 (7th Cir. 1996) ("The appropriate defendant for a denial of benefits claim would be the Plan . . ."); *see also Ross v. Rail Car America Group Disability Income Plan*, 285 F.3d 735, 740 (8th Cir. 2002) ("The employee benefit plan itself is ordinarily liable for benefits payable under the terms of the plan and is thus the primary defendant in a section 502(a)(1)(B) action." (citation omitted)).

As the Ninth Circuit observed in its majority opinion below, the Sixth and Eleventh Circuits have rejected *Gelardi* and permitted suits for plan benefits under § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), against plan "administrators" (which generally tend to be employers). *See Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir.), *cert. denied*, 488 U.S. 825, 109 S.Ct. 76 (1988) ("Unless an employer is shown to control administration of a plan, it is not a proper party defendant in an action concerning benefits"); *Layes v. Mead Corp.*, 132 F.3d 1246, 1249 (8th Cir. 1998) (holding that employer was not proper party defendant in ERISA action for benefits

because insurer was at all relevant times the sole administrator of plan); *Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186, 187 (11th Cir. 1997) ("The proper party defendant in an action concerning ERISA benefits is the party that controls administration of the plan.").

Under either of these two lines of authority, however, petitioner has no claim against Allmerica. Because petitioner did not sue the Plan, the first line authority bars her suit. Moreover, because petitioner did not sue the Plan's "administrator" and, indeed, has released all ERISA claims against the Plan's "administrators," the second line of authority bars her suit, as well.

B. No Court of Appeal Has *Held* That ERISA Permits Benefits Suits Against Plan Insurers Based *Solely* On Their Status As "Insurers"

Petitioner bases her petition for certiorari on her contention that a third line of cases has interpreted ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), as permitting suits for benefits against plan insurers based solely on their status as insurers. Petitioner is wrong.

The primary case petitioner cites in support of her contention that the Courts of Appeal are "split" regarding the propriety of suits for ERISA benefits against plan insurers is *Curcio v. John Hancock Mutual Life Insurance Company*, 33 F.3d 226 (3d Cir. 1994). This case simply does not support her contention. In *Curcio*, the insurer obtained summary judgment on the ground that the terms of the insurance policy it had issued the plan did not cover the benefits sought by the plaintiff. *Curcio* did not address the propriety of a suit for ERISA benefits against the insurer.

Petitioner's reliance on *Ward v. Management Analysis Company Employee Disability Benefit Plan*, 135 F.3d 1276

(9th Cir. 1998), *rev'd in part*, 526 U.S. 358, 119 S.Ct. 1380 (1999) and *Cisneros v. UNUM Life Ins. Co. of Am.*, 134 F.3d 939 (9th Cir. 1998), is equally unavailing. As the majority opinion below explained:

> [N]either decision addresses the issue nor makes clear what UNUM's role was under each of the plans at issue. *See, e.g., Ward*, 135 F.3d. at 1288 ("Whether MAC acted as fiduciary and as agent of UNUM in administering the MAC Plan's long-term disability policy, particularly in receiving and forwarding claims for benefits, cannot be decided as a matter of law on the existing record.") (emphasis added and footnote omitted). To the extent this circuit's decisions in this area may be talking past each other, we feel bound to follow those that are explicit in their holdings.

(Petitioner's Appendix B, p. 15a-16a.)

Indeed, as indicated in *Ward*, it is not uncommon for a plan insurer to appear on behalf of a benefit plan in a suit seeking ERISA benefits in order to protect the plan's interests, even though the insurer has not itself been sued. 135 F.3d at 1279.[4]

Finally, petitioner's reliance on *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997), *aff'd sub nom, Humana, Inc., v. Forsyth*, 525 U.S. 299, 119 S.Ct. 710 (1999), is also misplaced. As the Ninth Circuit here observed, the insurer in *Forsyth* "functioned as the plan administrator." (Petitioner's Appendix B, p. 15a.)

---

[4] "Plaintiff filed his complaint against the MAC Plan to recover his claimed benefits under ERISA . . . UNUM appeared as a defendant and filed an answer on behalf of itself and the MAC Plan. . . ." *Ward*, 135 F.3d at 1279.

Petitioner has identified no Court of Appeal opinion that has *held* ERISA permits a suit for benefits against an insurer who did not function as plan administrator. Instead, petitioner has pieced together four opinions that involved claims for benefits against plan insurers, but which did not address the propriety of those suits under ERISA. As this Court has declared on numerous occasions, a case may not be cited for a principle not stated therein. *See Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483 (1994) ("the 'maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.'" (quotation omitted)); *R.A.V. v. St. Paul*, 505 U.S. 377, 386, n. 5, 112 S.Ct. 2538 (1992) (it is "contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned"); *United States v. Stanley*, 483 U.S. 669, 680, 107 S.Ct. 3054 (1987) ("no holding can be broader than the facts before the court").

* * *

In short, petitioner's purported "three-way split" among the Circuits amounts to nothing more than a red herring designed to obtain Supreme Court review of a nonexistent issue. Again, petitioner cites no case that *held* a suit for ERISA benefits against a plan insurer is proper. Instead, petitioner merely relies on the fact that a few courts have *permitted* (but not discussed the propriety of) such suits against plan insurers. As the Court of Appeals observed here, such cases do not support petitioner's position because they did not fully (or even briefly) discuss the issue of whether an insurer is a proper defendant in a suit to recover ERISA benefits.

Thus, the Court should decline petitioner's invitation to resolve the issue of whether ERISA permits suits for benefits against plan "administrators"—the only arguable split among

the Courts of Appeal. Because petitioner did not sue the Plan "administrator" and has released all claims against the Plan's "administrators," resolution of the issue would have no bearing on the outcome of this case. While respondent agrees that public policy encourages the delineation of clear remedies under ERISA, that public policy is not served by issuing advisory opinions. *See Flast v. Cohen*, 392 U.S. 83, 97, 88 S.Ct. 1942 (1968) ("the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine"); *U.S. v. Fruehauf*, 365 U.S. 146, 157, 81 S.Ct. 547 (1961) ("such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed . . . we have consistently refused to give"). Because the petition presents no basis for Supreme Court review, it should be denied.

II. ERISA DOES NOT PERMIT SUITS FOR BENEFITS AGAINST INSURERS WHO ARE NOT PLAN ADMINISTRATORS

In addition to the fact that petitioner seeks an advisory opinion, review should be denied because judgment in Allmerica's favor was proper (under either line of authority discussed above), given the unique factual circumstances of this case. ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), does not permit suits for plan benefits against insurers who are not plan administrators.

A. Neither The Text Of ERISA, Nor Case Law, Permits Suits For Benefits Against Plan Insurers Based Solely On Their Status As "Insurers"

Section 502 of ERISA provides, in relevant part:

> (a) . . .
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> * * *
>
> (B) to recover benefits due to him . . .
>
> * * *
>
> (d) . . .
>
> * * *
>
> (2) . . . only against the plan as an entity . . . .

29 U.S.C. § 1132. *See also Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833, n. 7, 108 S.Ct. 2182 (1988).

In *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324 (9th Cir. 1985), the Ninth Circuit interpreted this plain language to hold that "ERISA permits suits to recover benefits *only against the Plan as an entity*." (Emphasis added.) This principle has been affirmed by the Ninth Circuit and other Courts of Appeal in a legion of cases. *See Spain v. Aetna Life Ins. Co.*, 13 F.3d 310, 311-12 (9th Cir. 1993); *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1287 (9th Cir. 1990), *cert. denied*,

498 U.S. 1087, 111 S.Ct. 964 (1991); *Gibson v. Prudential Ins. Co.*, 915 F.2d '414, 417 (9th Cir. 1990); *Riordan v. Commonwealth Edison Co.*, 128 F. 3d 549, 551 (7th Cir. 1997); *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993) (quoting *Gelardi*, 761 F. 2d at 1324).[5]

As explained in the preceding section, while there are cases in which courts have permitted recovery of ERISA benefits from insurers, such cases involve situations in which the insurer is acting as the plan's administrator. *See, e.g., Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1087 (1999), *cert. denied*, 528 U.S. 964, 120 S.Ct. 398 (1999); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997); *Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186, 187 (11th Cir. 1997). Here, Credence was the Plan's administrator, not Allmerica. (Respondent's Appendix B, p. 21a.) Moreover, even if Allmerica is somehow deemed to be a "plan administrator," petitioner's claims are precluded because she has released all claims against the Plan's "administrators." (Respondent's Appendix A.)

In a desperate attempt to identify a statutory basis for her contention that ERISA permits suits for plan benefits against insurers, petitioner suggests ERISA Section 502(d)(2) should

---

[5] District courts nationwide have followed *Gelardi*, as well. *See Adkins v. Unum Provident Corp.*, 191 F. Supp. 2d 956, 958 (M.D. Tenn. 2002); *Hupp v. Experian Corp.*, 108 F. Supp. 2d 1008, 1013 (N.D. Ill. 2000); *Holland v. Bank of America*, 673 F. Supp. 1511, 1517 (S.D. Cal. 1987); *Roeder v. Chemrex Inc.*, 863 F. Supp. 817, 828 (D. Wis. 1994); *Auto Club Ins. Ass'n v. Safeco Life Ins. Co.*, 833 F. Supp. 637, 643 (W.D. Mich. 1993); *Murphy v. Wal-Mart Assocs. Group Health Plan*, 928 F.Supp. 700, 710 (E.D. Tex. 1996); *Crawford v. Exxon Corp.*, 851 F.Supp. 242, 244 (M.D. La. 1994); *Holloway v. HECI Exploration Co. Employee's Profit Sharing Plan*, 76 B.R. 563, 570 (N.D. Tex. 1987). So too have state courts. *Cohen v. Equitable Life Assurance Society*, 196 Cal. App. 3d 669, 672 (1987); *Lambert v. Pacific Mut. Life Ins. Co.*, 211 Cal. App. 3d 456, 461, *review denied*, (1989).

be construed as permitting suits under 502(a)(1)(B) against entities other than the Plan. In fact, Section 502(d)(2) says nothing of the kind. To the contrary, the language of the sections 502(a)(1)(B) and 502(d), read together, clearly and unambiguously provides that the plan is the only entity against whom claims for benefits under the plan may be brought:

> Any money judgment under this subchapter against an employee benefit plan shall be enforceable *only against the plan as an entity and shall not be enforceable against any other person* unless liability against such person is established in his individual capacity under this subchapter.

§ 502(d)(2), 29 U.S.C. § 1132(d)(2) (emphasis added).

On its face, this language deals with the enforceability of a judgment obtained against the plan under Section 502(a)(1)(b). Here, petitioner has released all ERISA claims against the Plan. (Respondent's Appendix B.) Hence, there necessarily can be no "money judgment" against the Plan or any other person to be enforced under Section 502(d)(2).

Moreover, even to the extent that Section 502(d)(2) was somehow construed to permit a claim under Section 502(a)(1)(B) against someone other than the plan, it is clear from the above language that there must be established some independent basis for liability against such individual. Examples of such an independent basis would include a claim against a plan administrator under Section 502(a)(1)(A) or a fiduciary under Section 502(a)(2).[6] Here Everhart does not,

---

[6] Allmerica notes that Everhart cannot state a claim against Allmerica under ERISA § 502(a)(2) for breach of fiduciary duty pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a), which authorizes a beneficiary to bring an action against a fiduciary for breach of fiduciary duty on behalf of the

and could not, assert any such theory of individual liability against Allmerica.[7] Rather she seeks only plan benefits under Section 501(a)(1)(B), but seeks them from an entity that is not the Plan or its administrator.

Moreover, petitioner's reliance on *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 120 S.Ct. 2180 (2000), is misplaced. In *Harris*, the Supreme Court held that ERISA Section 502(a)(3), which allows a court to award equitable relief in the case of a breach of fiduciary duty, allows an action to be brought not only against the breaching fiduciary, but also against a Party in Interest with knowledge of the breach. *Harris* in no way involved the provision under which Everhart seeks damages against Allmerica, ERISA Section 502(a)(1)(B), which authorizes suits for Plan benefits. In fact, *Harris* reaffirmed that "ERISA's comprehensive and reticulated scheme warrants a cautious approach to inferring remedies not expressly authorized by the text." *Id.* at 247 (quotation marks omitted). Moreover, the Court in *Harris* relied on the language of § 1132(l) as explicitly authorizing suits for breach of fiduciary duty against a fiduciary or "other person." *Id.* at 247-48 (quotation marks and citations omitted). ERISA contains no similar express authorization to reach third parties exists for § 1132(a)(1)(B).

Plan, *but not for the beneficiary's personal damages. Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 105 S.Ct. 3085 (1985); *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1418 (9th Cir. 1991). Here, Everhart is not seeking to recover damages on behalf of the Plan; she is seeking a personal recovery in the form of additional benefits. Accordingly, she cannot state a claim against Allmerica for breach of fiduciary duty pursuant to ERISA.

[7] Everhart's suggestion that 29 U.S.C. Section 1002(1) provides a basis for independent liability against Allmerica is wholly without merit. Section 1002(1) merely *defines* the term "employee welfare benefit plan."

Thus, the plain language of ERISA does not permit suits for plan benefits to be maintained against plan insurers based solely on their status as insurers. Petitioner cites no provision of ERISA (or passage from its legislative history) supporting a distinction between remedies available to beneficiaries of insured and self-funded plans. A national body of case law confirms that suits for ERISA benefits may not be maintained against plan insurers that are not plan administrators. Because petitioner has admitted that Credence was the Plan's administrator and, in any event, has released all claims for ERISA benefits against the Plan's "administrators," there is no basis for her suit against Allmerica.

B. Permitting Suits Against Plan Insurers For ERISA Benefits Would Frustrate the Legislative Intent Underlying ERISA.

Petitioner asks this Court to create a new remedy under ERISA available to participants and beneficiaries of an insured benefit plan (as opposed to "self-funded" plan). Petitioner's distinction between self-funded benefit plans and insured plans not only has no basis whatsoever in the language of ERISA, it is contrary to the extensive case law interpreting ERISA discussed in the previous section. ERISA nowhere distinguishes between the remedies available against insured and self-funded plans.[8] Moreover, ERISA nowhere authorizes a suit to recover benefits by a plan participant or beneficiary against a plan's insurer.

Had Congress intended to distinguish between ERISA remedies available to beneficiaries of insured and self-funded benefit plans, Congress would have so indicated in the text of

---

[8] Such distinction has been recognized for purposes of preemption by ERISA. ERISA § 514(b)(1), 29 U.S.C. § 1444(b)(1). This is not an issue in this case.

the statute. As this Court has cautioned concerning the enactment of ERISA:

> Congress did not intend to authorize other remedies that it simply forgot to incorporate generally. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' . . . We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA . . . Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.

Russell, 473 U.S. at 146-47 (internal citations and quotation marks omitted). *See also Thomason v. Aetna Life Ins. Co.*, 9 F.3d 645, 647 (7th Cir. 1993) (Although Congress expected courts to create a body of federal common law under ERISA, this is done only when "ERISA itself does not itself expressly address the issue before the court." (citation and internal quotation marks omitted)). To adopt petitioner's distinction between insured and "self-funded" employee benefit plans for purposes of establishing liability under ERISA would require this Court (literally) to write words into the text of ERISA.

In addition to lacking statutory support, petitioner's proposed construction of ERISA would contravene the legislature's intent. One of the public policies underlying the enactment of ERISA is the provision of clear and final remedies to participants and beneficiaries. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53-55, 107 S.Ct. 1549 (1987); *Russell*, 473 U.S. 134 at 146-47. Another is avoiding burdens on the court system through, for example, duplicative suits such as this one. *See, e.g., Menhorn v. Firestone Tire & Rubber So.*, 738 F.2d 1496, 1500, n. 2 (9th Cir. 1984) (explaining that Congress authorized suits for benefits under

section 1132(a)(1)(B) to be brought in both state and federal court to "mitigate to some degree the burden on the federal courts resulting from ERISA").

Under petitioner's theory, a plan participant or beneficiary would be free to pursue two separate actions to recover plan benefits: one against the plan and a second against the plan's insurer. Such a scheme would frustrate the legislative goals of providing clear and expeditious remedies under ERISA.

Congress has provided participants and beneficiaries with a clear remedy through which to obtain unpaid plan benefits: a suit against the plan. *See* 29 U.S.C. § 1132(a)(1)(B). There is simply no reason to carve out a new (and duplicative) remedy for participants and beneficiaries of an insured (as opposed to self-funded) plan. Indeed, Allmerica had no contractual relationship with Everhart here and was not acting as the Plan administrator. Everhart presents *no* reason—and certainly *no* compelling reason—why this Court should tamper with the remedies enumerated in the plain language of the statute.

CONCLUSION

As both the district court and the Court of Appeals held, petitioner lacks standing to sue Allmerica for ERISA benefits, regardless of whether ERISA permits suits for benefits against plan administrators. Allmerica is neither the Plan, nor the Plan's administrator. Moreover, *no legal authority* supports petitioner's assertion that ERISA benefits are recoverable against plan insurers who are not plan administrators. Accordingly, respondent respectfully requests that the Court deny this Petition for Writ of Certiorari.

Respectfully submitted,

PAUL E. B. GLAD *
SONIA RENEE MARTIN
SONNENSCHEIN NATH & ROSENTHAL
685 Market Street
6th Floor
San Francisco, CA 94105
(415) 882-5000

* Counsel of Record

Attorneys for Respondent Allmerica Financial Life Insurance Company, dba State Mutual Life Assurance Company of America

APPENDICES

APPENDIX A

RELEASE

THIS RELEASE of all claims against CREDENCE SYSTEMS CORPORATION, its past, present and future partners, parents, subsidiaries, related entities, predecessors, successors, directors, officers, agents, employer sponsored employee benefit and welfare benefit plans, trustees and administrators of such employee benefit plans, employees, contractors and assigns (hereinafter collectively called "Credence"), is made by LYN EVERHART (hereinafter "Everhart").

WITNESSETH:

WHEREAS. Everhart is the widow of Charles Everhart who was for a period of time an employee of Credence until he passed away on December 6, 1994; and

WHEREAS, a dispute has arisen over alleged compensation and benefits owed from Credence to the estate of Mr. Everhart;

WHEREAS, the parties wish to resolve this dispute in a way which will preserve the good will which exists between them and to settle all disputes and avoid Litigation;

NOW, THEREFORE, for and in consideration of the payment by Credence to Everhart of a sum, of two hundred thirty thousand dollars ($230,000) and for other good and sufficient consideration, Everhart, fully and forever releases and discharges Credence from, and covenants not to sue or otherwise institute any legal or administrative proceedings against Credence with respect to any matter arising out of or relating to her spouse's employment with Credence.

A. foregoing she is waiving any rights she may have had, now has, or in the future may have to pursue any and all remedies available to her under any employment-related causes of action, including without limitation, claims for breach of contract, breach of the covenant of good faith and fair dealing, fraud, claims under the Employee Retirement Income Security Act of 1974, claims for employee benefits, and any other laws and regulations relating to her husband's employment or compensation.

B. This RELEASE shall be deemed to have been entered into in the State of California and shall be construed and interpreted in accordance with the laws of that state.

C. In addition, and in further consideration of the foregoing, Everhart hereby expressly waives any and all rights and benefits conferred upon her by the provisions of Section 1542 of the Civil Code of the State of California, which states as follows:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

D. Everhart acknowledges and agrees that no promises or representations were made which do not appear written herein and that this RELEASE contains the entire agreement of the parties as to the subject matter thereof.

E. Everhart hereby acknowledges that she has read and understands the foregoing RELEASE and that she signs it voluntarily and without coercion. Everhart further acknowledges that she has consulted with an attorney of her own choosing concerning the waivers contained in this RELEASE, and that the waivers she has made herein are

knowing, conscious and with fall appreciation that she is forever foreclosed from pursuing any of the rights so waived.

Executed this 21st day of March, 1997.

/s/ Lyn Everhart
LYN EVERHART
Law Offices of Charles J. Wisch

Charles J. Wisch
Attorney for Lyn Everhart

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Docket No. 99-17094

LYN EVERHART,
Appellant and Plaintiff,

vs.

ALLMERICA FINANCIAL LIFE INSURANCE COMPANY,
doing business as STATE MUTUAL LIFE ASSURANCE
COMPANY OF AMERICA,
Appellee and Defendant.

Appeal from Judgment of the United States District Court
for the Northern District of California
(No. CV-99-00733 VRW)

APPELLANT'S REPLY BRIEF

CHARLES J. WISCH, SBN 68050
LAW OFFFICE OF CHARLES J. WISCH
655 Montgomery Street, 12th floor
San Francisco, California 94111
Tel (415) 788-1945
Fax (415) 398-1743

Attorneys for Appellant and Plaintiff
Lyn Everhart

TABLE OF CONTENTS

	Page
Table of Authorities	ii
INTRODUCTION	1
ARGUMENT	3
A. Everhart Properly Sued Allmerica for Its Refusal to Pay Benefits under the Life Insurance Policy	3
B. Everhart Has Never Released Her Claim Against Allmerica	12
C. Allmerica Cannot Rescind or Modify the Amount of Benefits Payable to Everhart by Asserting "Fraud"	15
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page
American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951)	5
Auto Club Ins. Assn. v. Safeco Life Ins. Co., 833 F.Supp. 637 (W.D. Mich 1993)	6
Baseheart v. Life Insurance Co. of North America, 960 F.Supp. 12 10 (W.D. Ky. 1997)	18
Cisneros v. UNUM Lifie Ins. Co., 134 F.3d 939 (9th Cir. 1998)	3, 5
Equitable Life Assurance Society v. Crysler, 66 F.3d 944 (8th Cir. 1995)	6
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)	11
Forsyth v. Humana, Inc., 114 F.3d 1467 (9th Cir. 1997) *aff d sub nom. Humana, Inc. v. Forsyth*, 119 S.Ct. 710 (1999)	20
Gelardi v. Pertec Computer Corp., 761 F.2d 1323 (9th Cir. 1985)	1, 3, 6, 7, 12
Gibson v. Prudential Life Ins. Co., 915 F.2d 414 (9th Cir. 1990)	6
Ghorgani v. Pacific Gas & Electric Co., 1998 WL 184312 (N.D. Cal. 1998)	6
Hajek v. Burlington Northern Railroad Co., __ F.3d __, 1999 WL 569363 (9th Cir. 1999)	5

TABLE OF AUTHORITIES—Continued

Page

Holland v. Bank of America,
673 F.Supp. 1511 (S.D. Cal. 1987) 6

Lambert v. Pacific Mutual Life Ins. Co.,
211 Cal.App.3d 456 ..... 6, 7

Lee v. Burkhart,
991 F.2d 642 (9th Cir. 1993) 1, 6

Likins-Foster Honolulu Corp. v. Commr Internal Revenue Service,
840 F.2d 642 (9th Cir. 1987) 13

Mackey v. Lanier Collection Agency & Service, Inc.,
486 U.S. 825 (1988) 9

Madden v. 177 Long Term Disability Plan,
914 F.2d 1279 (9th Cir. 1990) 6

Mann v. New England Mutual Life Ins. Co.,
1991 WL 631954 (N.D. Cal. 1991) 7

Menhorn v. Firestone Tire & Rubber Co.,
738 F.2d 1496 (9th Cir. 1984) 11

New York Life Ins. Co. v. Hollender,
38 Cal.2d 73 (1951) 17

Riordan v. Commonwealth Edison Co.,
128 F.3d 549 (7th Cir. 1997) 6

Roeder v. Chemrex Inc.,
863 f.Supp. 817 (E.D. Wisc. 1994) 7

TABLE OF AUTHORITIES—Continued

Page

Sea Harvest Corp. v. Riviera Land Co.,
868 F.2d 1077 (9th Cir. 1989) 13

Security Life Ins. Co. of America v. Meyling,
146 F.3d 1184 (9th Cir. 1998) 11, 17, 18, 20

Spain v. Aetna Life Ins. Co.,
13 F.3d 310 (9th Cir. 1993) 6

Taft v. Equitable Life Assur. Society,
9 F.3d 1469 (9th Cir. 1994) 20, 21

Thompson v. Occidental Life Ins. Co.,
9 Cal.3d 904 (1973) 18, 19

Turner v. Safeco Life Insurance Co.,
17 F.3d 14 (6th Cir. 994) 18

Ward v. Management Analysis Company Employee Disability Plan,
135 F.3d 1276 (9th Cir. 1998) *aff'd in part and rev'd in part on other grounds sub nom. Unum Life Ins. Co. v. Ward*, __ U.S. __, 119 S.Ct. 1380 (1999)..... 4, 5

Yacabucci v. Sun Life Assurance Co.,
1999 WL 300647 (N.D. Cal. 1999)..... 7

STATUTES AND RULES

California Business and Professions Code
Section 7026..... 14

TABLE OF AUTHORITIES—Continued

	Page
California Insurance Code	
Section 22	14
Section 23	14
Federal Rules of Civil Procedure	
Rule 14	12
Rule 20	11
Rule 56(e)	19
Rule 56(f)	19
29 United States Code	
Section 1002(l)	1, 9, 10, 15
Section 1002(16)(A)(i)	15
Section 1132	8, 9
Section 1132(a)(1)(B)	3, 4, 8, 11, 12, 22
Section 1132(d)	7, 8, 9
OTHER AUTHORITIES	
Black's Law Dictionary (Westlaw On-Line Ed.)	14
Corpus Juris Secundum	
17B, Section 619	10, 13
Restatement (2d) Contracts	
Section 302(1)(b)	10, 13
Section 304	10, 13

INTRODUCTION

Appellee Allmerica's numerous arguments are designed to distract the court from Everhart's central contention: that there is a difference in who can properly be sued for an ERISA benefits claim depending upon whether the employee benefit plan is self-funded or insured. In the case of self-funded plan, only the plan can be sued for benefits because it is the only entity obligated to pay those promised benefits. By contrast, where the plan has purchased insurance to provide benefits, the insurer has undertaken a contractual obligation that permits plan beneficiaries to sue either the insurer or the plan for the promise benefits.

That difference is aptly illustrated by the two opinions of this circuit in *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323 (9th Cir. 1985), and *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 19970 *aff'd sub nom. Humana, Inc. v. Forsyth*, 119 S.Ct. 710 (1999). *Gelardi* and *Forsyth* are consistent with one another and with ERISA. Gelardi held that, in the case of a self-funded plan, only the plan could be sued because it was the only entity owing benefits to the beneficiares.[1] In *Forsyth*, by contrast, the plan exercised it express right under ERISA, 29 U.S.C. § 1002(1), to purchase insurance to provide the promised benefits. Thus, both the plan and the insurer owed a contractual duty to the beneficiaries to pay those benefits, subjecting both to liability.

There is no statutory or public policy justification for granting the insurer immunity from suit where it refused to pay benefits. The common law is directly to the contrary,

---

[1] By definition, a "self-funded plan" is funded by the employer, not an insurance policy. While an insurance company may administer the plan, only the employer pays into the plan whatever funds are subsequently disbursed to pay the promised benefits. See *Lee v. Burkhart*, 991 F.2d 1004, 1006 (2d Cir. 1993).

universally permitting beneficiaries of insurance policies to sue the insurer for refusal to pay promised benefits. Nothing in either the language or statutory history of ERISA suggest that Congress intended to immunize insurers from suits for benefits where the plan has exercised its right under ERISA to by such insurance.

Allmerica has also raised two new issues, unrelated to its status as a proper party and not relied upon by the district court, to justify the district court's grant of summary judgment. First, Allmerica asserts that it was released from liability when Everhart settled with and released Credence, although the release provides nothing of the sort. Second, Allmerica asserts that it was entitled to an absolute defense on the basis of fraud, although the policy's incontestability clause bars such a defense and the facts are clearly contested. Neither of Allmerica's additional arguments justified summary judgment. The judgment should be reversed.

ARGUMENT

A. Everhart Properly Sued Allmerica for Its Refusal to Pay Benefits under the Life Insurance Policy

Allmerica strives unsuccessfully to distinguish *Forsyth's* holding allowing employee benefit plan beneficiaries to sue the plan insurer for recovery of benefits under 29 U.S.C. § 1132(a)(1)(B). (Allmerica Brief, 13-23.)

Ignoring that *Gelardi* involved a self-funded plan, Allmerica asserts that insured plans are governed by that case's statement that "ERISA permits suits to recover benefits only against the Plan as an entity . . ." *Gelardi*, 761 F.2d at 1324. In order to create a straw man, Allmerica mischaracterize Everhart's position as asserting that *Forsyth* sub silentio overruled *Gelardi*. To the contrary, Everhart contends that both cases are perfectly consistent when viewed in their

respective factual contexts. Allmerica completely ignores that *Gelardi* dealt with a self-funded plan that paid the promised benefits, while in *Forsyth*, the plan had purchased insurance, allowing the beneficiaries to sue the insurance company for violating its contractual obligation to pay those promised benefits.

Post-*Forsyth*, although not directly addressing this issue, the Ninth Circuit has repeatedly permitted ERISA benefits claims against plans' insurers. For example, *Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939 (9th Cir. 1998), reversed a summary judgment that had been granted on grounds unrelated to the question of proper defendants. The court permitted the beneficiary to pursue her claim against the insurer for ERISA benefits, although the plan was not joined as a party.

A similar result was reached in *Ward v. Management Analysis Company Employee Disability Plan*, 135 F.3d 1276 (9th Cir. 1998), aff'd in part and rev'd in part on other grounds sub nom. *Unum Life Ins. Co. v. Ward*, __ U.S. 119 S.Ct. 1380 (1999). The employer had created an employee benefit plan, and the plan funded the benefits with insurance purchased from UNUM. 135 F.3d at 1278; see 119 S.Ct. at 1386 n. 2 ("this case does not involve a self-insured plan"). The district court dismissed the plaintiffs benefits claim. Impliedly recognizing that the beneficiary had a right to pursue that claim against the insurer, both the Ninth Circuit and the Supreme Court reversed and reinstated the benefits claim without any suggestion whatsoever that the insurer was not a proper defendant. See 119 S.Ct. at 1391 ("Ward sued under § 502(a)(1)(B) [29 U.S.C. § 1132(a)(1)(B)] 'to recover benefits due . . . under the terms of his plan.'")

Allmerica, attempts to distinguish *Forsyth* on the grounds that the defendant insurer had "stipulated" to the assertion of an ERISA benefits claim against it. Allmerica ignores the

established rule that the federal courts not only must refuse to resolve matters outside their subject matter jurisdiction, but also have an obligation sua sponte to raise that jurisdictional issue regardless of the parties' actions. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 and n. 17 at 18 (1951); *Hajek v. Burlington Northern Railroad Co.*, __ F.3d __, 1999 WL 569363 (9th Cir. 1999). If ERISA does not provide a beneficiary the remedy of a benefits claim against the plan's insurer, the defendant in *Forsyth* could not have stipulated to such subject matter jurisdiction. In fact, if Allmerica's reading of ERISA and the *Gelardi* holding were correct, the panels in *Forsyth*, *Cisneros*, and *Ward* would have been obligated to order dismissal of the benefits claims against the insurers for lack of subject matter jurisdiction. That all three Ninth Circuit panels and, in *Ward*, the Supreme Court, specifically allowed the cases to proceed demonstrates that beneficiaries can assert ERISA benefits claims against their plans' insurers.

Virtually all of the case law Allmerica cites fails to support its assertion that a plan beneficiary can sue only the plan, and not an insurer, for benefits. Most of the cases did not involve any issue of insurance at all because, like *Gelardi*, the plan

was self-insured.[2] In most of the rest, no benefits claim was asserted against any plan insurer.[3]

Allmerica does cite four cases—three district court opinions, and one from the California Court of Appeal—in which the courts held that a beneficiary could not assert a benefits claim against a plan's insurer. None of those cases correctly considers the distinction between a self-funded plan and an insured plan. Moreover, three of the cases predated *Forsyth*, and the fourth failed to discuss *Forsyth* at all in the context of the benefits claim:

> 1. In *Lambert v. Pacific Mutual Life Ins. Co.*, 211 Cal.App.3d 456, 463 (1989), the California Court of Appeal recited that *Gelardi* had held "ERISA permits suits to recover benefits only against the plan as an entity, and not the employer or insurer . . ." That holding was clearly erroneous, as there was no insurance claim at issue in *Gelardi* because the plan had been self-funded.

---

[2] *Gibson v. Prudential Life Ins. Co.*, 9 15 F.2d 414, 415 (9th Cir. 1990) [insurance company was a—claims processing agent, not an insurer of the benefits]; *Spain v. Aetna Life Ins. Co.*, 13 F.3d 310, 311, 312 (9th Cir. 1993) [insurance company was plan administrator, not an insurer of the benefits]; *Lee v. Burkhart*, supra, 991 F.2d 1004, 1006 (2d Cir. 1993) (self-funded plan]; *Auto Club Ins. Assn. v. Safeco Life Ins. Co.*, 833 F.Supp. 637, 638, 640 (W.D. Mich. 1993) [self-funded employee benefits plan; "the insurance contract at issue in this case was not purchased by the Plan"]; *Ghorbani v. Pacific Gas & Electric Co.*, 1998 WL 184312, *1 (N.D. Cal. 1998) [self-funded plan].

[3] *Madden v. ITT Long Term Disability Plan*, 914 F.2d 1279, 1282 (9th Cir. 1990); *Holland v. Bank of America*, 673 F.Supp. 1511, 1518 (S.D. Cal. 1987) [beneficiary erroneously sued employer; insurer not a party]; *Riordan v. Commonwealth Edison Co.*, 128 F.3d 549 (7th Cir. 1997); *Cohen v. Equitable Life Assurance Society of the United States*, 196 Cal.App.3d 669, 672 (1987) (plan's insurer erroneously cross-complained against employer rather than plan for recovery of allegedly overpaid benefits].

2. In *Mann v. New England Mutual Life Ins. Co.*, 1991 WL 631954, *2 (N.D. Cal. 1991), an unreported opinion, the district cited *Gelardi* and *Lambert* as holding that ERISA did not permit suits "against an employer or insurer." The court failed to recognize that *Gelardi* had not considered any insurance issue because it involved a self-funded plan, and that *Lambert* had misstated the ruling in *Gelardi*.

3. *Roeder v. Chemrex Inc.*, 863 F.Supp. 817 (E.D. Wisc. 1994) held that, under the undisputed facts of the case, the plaintiff was ineligible for benefits under the insurance policy purchased by the employee benefit plan. 863 F.Supp. at 827. In dictum, the court added that the plaintiff's failure to join the plan justified dismissing his complaint for benefits. Besides being dictum, the court's ruling disregarded the final clause of 29 U.S.C. § 1132(d), providing for liability for benefits against persons other than the plan where that liability is "established in his individual capacity under this subchapter."

4. The only post-*Forsyth* case cited by Allmerica is the unreported opinion in *Yacobucci v. Sun Life Assurance Co.*, 1999 WL 300647 (N.D. Cal. 1999).[4] In *Yacobucci*, as here, the district court did not consider that the cases it relied upon all involved self-funded plans, rather than instances where the plans had purchased insurance to provide the promised benefits. Moreover, although it referenced *Forsyth* on another issue, the court did not consider the *Forsyth* ruling's impact upon a beneficiary's right to assert a claim against the plan insurer.

---

[4] That opinion was rendered by the same court as the present case.

Thus, none of the cases cited by Allmerica supports any ruling that a beneficiary seeking recovery of benefits can only sue the plan, and not the insurer, where the plan is not self-funded but has provided the promised benefits through insurance.

By artful editing of 29 U.S.C. § 1132, Allmerica also tries to argue that ERISA expressly limits suits for recovery of benefits to claims against a plan. (See Allmerica Brief, p. 13.) To the contrary, § 1132 does not impose any such limitation upon suits for benefits.

29 U.S.C. § 1132(a)(1)(B) specifically allows beneficiaries such as Everhart to sue for recovery of benefits due under the terms of the plan. The section does not, however, identify who can be sued.

29 U.S.C. § 1132(d) makes plans liable for suits for benefits, but does not restrict such suits to plans alone:

> "(1) An employee benefit plan may sue or be sued under this subchapter as an entity. . .
>
> "(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter."

ERISA thus provides that a plan can sue and be sued, and is liable for judgments rendered against it. ERISA also provides that a judgment against the plan can only be enforced against the plan, thus protecting the employer or the plan administrator from personal liability for the plan's obligations. That is the meaning of this circuit's ruling in *Gelardi*. However, § 1132(d) in no way restricts benefits

claims against any other parties who might have a legal obligation to pay those benefits, such as an insurance company that has contracted to pay benefits under the terms of the plan.[5]

In adopting ERISA, Congress explicitly authorized employee benefits plans to purchase insurance to provide the promised benefits. 29 U.S.C. § 1002(l). Consequently, under the scheme established by Congress, employee benefits plans have the option of either funding promised benefits themselves, or purchasing insurance policies to shift to the insurer funding of those benefits. Of course, the plan incurs the cost of any insurance policy it purchases. However, the insurer contracts with the plan, for the intended benefit of all beneficiaries, to provide the promised benefits.

There certainly is no reason to believe that, in adopting ERISA, and particularly § 1002(l), Congress was unaware that the common law universally applied throughout the United States provides that beneficiaries of insurance policies have the right to sue insurers who deny them the promised benefits of an insurance policy. See Restatement (2d) Contracts, § 302(l)(b) and comm. c, illustration 4, and § 304; 17B C.J.S. § 619. Moreover, there is no provision in ERISA that Congress, having authorized employee benefit plans to purchase insurance, intended to abrogate that common law

---

[5] Allmerica attempts to imply that the Supreme Court held in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833 n. 7 (1988), that § 1132 expressly limits benefits claims to plans only. (See Allmerica Brief, p. 13.) The *Mackey* case does not so hold or imply. On the contrary, the Supreme Court merely confirmed that ERISA provides in § 1132 that the plan can "sue or be sued." 486 U.S. at 832-833. The Court did not consider whether an insurer that has contracted with a plan in accordance with 29 U.S.C. § 1002(l) was somehow immunized from suits for benefits.

right of beneficiaries.[6] On the contrary, in the absence of explicit statutory language immunizing insurers from such liability, *Forsyth* correctly held that ERISA allowed beneficiaries to sue the insurance company for benefits under § 1132(a)(1)(B), and that holding applies equally here. Everhart, as an intended beneficiary of the insurance contract between Credence and Allmerica, had the right to sue Allmerica when it denied her the full benefits promised by that contract.

Allmerica's further argument that allowing such an action would somehow encourage "duplicative lawsuits" is nonsense. Under the usual joinder rules, a beneficiary would be entitled to join both the plan and the insurer in a suit for recovery of the promised benefits. Fed.R.Civ.P. 20. Similarly, a plan or insurer sued for benefits, and claiming that the other is liable for those benefits, would be entitled to bring the other into the case through a third party complaint. Fed.R.Civ.P. 14. Finally, a beneficiary who failed to join both obligors would risk the bar of collateral estoppel if it tried to assert successive lawsuits. Fed.R.Civ.P. 14. Finally, a beneficiary who failed to join both obligors would risk the bar of collateral estoppel if it tried to assert successive lawsuits.

---

[6] Contrary to Allmerica's red herring argument (Allmerica Brief, 21-22), Everhart does not contend that Congress, in enacting ERISA, "forgot" to grant the remedy of an action for benefits against plan insurers. Congress well knew that the common law allows beneficiaries to sue insurers for policy benefits. By authorizing employee benefit plans to purchase insurance to provide benefits, and jurisdiction to award benefits in both the state and federal courts, Congress intended that common law principle to be applied by the courts. See *Security Life Ins. Co. of America v. Meyling*, 146 F.3d 1184,1191 (9th Cir. 1998); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499, 1500 n. 2 (9th Cir. 1984); *Equitable Life Assurance Society v. Crysler*, 66 F.3d 944, 948-949 (8th Cir. 1995).

Forsyth and *Gelardi* are simply two sides of the same rule: A party that assumes responsibility to pay benefits under an employee benefit plan—either a plan that is self-funded or an insurance company that sells the plan insurance to fund those benefits—is liable to the beneficiary for those benefits under 29 U.S.C. § 1132(a)(1)(B). The district court's summary judgment dismissing Everhart's claim against Allmerica for plan benefits should be reversed.

B. Everhart Has Never Released Her Claim Against Allmerica

Without the benefit of any authority whatsoever, Allmerica asserts that Everhart has released Allmerica by having entered into a separate release with Credence. (Allmerica Brief, 24-26.) That argument is completely misconceived.

On March 21, 1997, Everhart entered into a release with Credence relating to "a dispute . . . over alleged compensation and benefits owed from Credence to the estate of Mr. Everhart . . ." (ER 7, ¶ 9; ER 44.) "Credence" was defined in the release to include Credence and "its past, present and future partners, parents, subsidiaries, related entities, predecessors, successors, directors, officers, agents, employer sponsored employee benefit and welfare plans, trustees and administrators of such employee benefit plans, employees, contractors and assigns." (ER 44.)

Allmerica asserts that neither Everhart nor Charles had any contractual relationship with Allmerica, and therefore any claim would have to arise out of some theory that Allmerica was either a "related entity" or "contractor" of Credence. Allmerica further asserts that, because Everhart released Credence's related entities and contractors, she released Allmerica. These assertions are erroneous in three regards.

First, Everhart does not need a direct contractual relationship with Allmerica to sue it for denial of benefits. As Everhart was an intended beneficiary of the insurance policy, the common law followed in every state provides her the right to sue Allmerica for denial of the promised benefits. See Restatement (2d) Contracts, § 302(l)(b) and comm. c, illustration 4, and § 304; 17B C.J.S. § 619.

Second, Allmerica is not a "related entity" of Credence as that term is defined in law. The term "related entities" refers to entities that share ownership, officers, or directors, or may be parent and subsidiary corporations. See, e.g. *Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077, 1078 (9th Cir. 1989); *Likins-Foster Honolulu Corp. v. Comm'r Internal Revenue Service*, 840 F.2d 642, 646 (9th Cir. 1987). The record is devoid of any evidence that Allmerica and Credence had common ownership or directors, or were parent and subsidiary.

Third, Allmerica is not a "contractor" of Credence. The release between Everhart and Credence specifically recited that it is to be construed in accordance with California law. (ER 45, ¶ B].) The term "contractor" "is commonly reserved to designate one who, for a fixed price, undertakes to procure the performance of works or services on a large scale, or the furnishing of goods in large quantities . . ." Black's Law Dictionary (Westlaw On-Line Ed.). Moreover, the term "contractor" is statutorily defined to mean "builder." Cal. Bus. & Prof. C. § 7026. "Insurance," by contrast, is a contract undertaking to indemnify another against loss, damage, or liability from a contingent or unknown event. Cal. Insur. C. § 22. Allmerica, as an insurer, is defined by law as one "who undertakes to indemnify another by insurance." Cal. Insur. C. § 23. By no stretch of the imagination could Allmerica be a "contractor" of Credence under the terms of the release.

Allmerica asserts an alternative argument that, because the release applied to "administrators of such employee benefit plans" (see ER 44), it was released under that language. Allmerica erroneously relies upon a general dictionary definition of the term "administrator," disregarding the fact that the terms "administrator" and "plan" used in the release are specifically defined by ERISA. Those definitions do not include Allmerica.

A "plan" is defined as the plan established by the employer. 29 U.S.C. § 1002(l). The statute states that a plan provides benefits, and may do so "through the purchase of insurance." *Id.* Such insurance is not, as a matter of law, the plan itself. Moreover, the summary plan description provided by Credence to its employees in this case identifies the plan as "Credence Systems Corporation," not Allmerica. (ER 37, ¶ 1.)

Similarly, the term "administrator" is a term of art defined by ERISA to mean "the person specifically so designated by the terms of the instrument under which the plan is operated." 29 U.S.C. § 1002(16)(A)(i). The summary plan description specifically identifies the plan administrator as "Credence Systems Corporation," not Allmerica. (ER 37, ¶ 6.)

Allmerica was not released by the March 21, 1997 agreement between Everhart and Credence.

C. Allmerica Cannot Rescind or Modify the Amount of Benefits Payable to Everhart by Asserting "Fraud"

Allmerica asserts that it was entitled to escape its liability to pay the entire death benefit promised in the policy—two times Charles' annual earnings, i.e. $480,000—due to alleged fraud, but instead that it could pay only the lesser amount of $170,000. (Allmerica Brief, 26-34.) Allmerica's argument ignores the policy language (1) specifically waiving fraud, (2)

promising specified benefits of "two times basic annual earnings," and (3) providing that Credence, as the "Policyholder," not Everhart as a beneficiary or Charles as an employee, was liable to reimburse Allmerica for any benefits paid based upon erroneous information.

First, the policy contains an express incontestability provision waiving any alleged fraud:

> "No statement made by a covered person will be used to contest the validity of any life coverage after it has been in force for two years during the lifetime of that person." (ER 21, Section 6.0.)

The parties stipulated that Charles became enrolled under the policy on October 5, 1992, more than two years prior to his death on December 5, 1994. (ER 7, ¶¶ 5, 8].) Thus, under the contract's incontestability provision, Allmerica could not rely upon any allegedly fraudulent statement of earnings to rescind Charles' full death benefit of two times his annual earnings.

Second, in an effort to avoid the incontestability provision, Allmerica attempts to mischaracterize its position as "enforcing" the policy. This mischaracterization is accomplished by Allmerica's ignoring the policy language specifically promising "[t]wo times basic annual earnings." (ER 15.) Instead, Allmerica argues that it is simply providing two times the amount of Charles' earnings as set forth in a false earnings disclosure. Allmerica is actually attempting to rescind the policy and substitute a new provision to the effect that the benefit will be two times Charles' declaration, not his basic annual earnings.

Through its argument that Charles' supposed misrepresentation was "material" to its premium calculations, Allmerica has unwittingly admitted that it is not attempting to

enforce the policy, but to rescind and rewrite it. (Allmerica Brief, 30-34.) The cases cited by Allmerica demonstrate that a material misrepresentation is relevant only insofar as the misrepresentation justifies rescission of the policy. *Security Life Ins. Co. of America v. Meyling*, supra, 146 F.3d 1184, and particularly 1191-1193. Either the policy is enforced according to its express terms or it is rescinded; Allmerica cannot rewrite it. Through the incontestability provision, however, Allmerica contractually surrendered the right to rescind for false statements. Therefore, the policy must be enforced in accordance with its promise of "two times basic annual earnings." [7]

Moreover, even if Allmerica could rescind, there exists a factual dispute whether the allegedly false statement materially affected the premium. The test for whether a

---

[7] Allmerica's cases do not support its to be enforcing the insurance policy. In *New York Life Ins. Co. v. Hollender*, 38 Cal.2d 73 (1951), the policy expressly allowed adjustment of the benefits if the age of the insured were misstated. *Id.* at 76. The insured misstated his age, and the insurer merely enforced the age adjustment provision. *Id.* at 78-83. There is no similar express provision here allowing Allmerica to adjust the amount of life insurance to something other than two times Charles' basic annual earnings.

In *Turner v. Safeco Life Insurance Co.*, 17 F.3d 141 (6th Cir. 1994), the plaintiff's deceased husband never became entitled to a group policy's death benefit because he did not satisfy the policy's employment eligibility condition. *Id.* at 145. The incontestability provision was irrelevant to his ineligibility. *Id.* at 145-146. Charles was an employee of Credence and, thus, eligible for life insurance of two times basic annual earnings.

In *Baseheart v. Life Insurance Co. of North America*, 960 F.Supp. 1210 (W.D. Ky. 1997), the employee was ineligible to purchase an additional benefit beyond the basic benefit provided by the policy. *Id.* at 1212. The policy here provides a basic benefit of "two times basic annual earnings." The issue here is calculating that basic benefit, not whether Charles qualified for some "additional benefit."

misrepresentation is "material" is whether Allmerica would either have refused to issue the insurance had it known the truth or would have charged a materially different premium. *Security Life Insur. Co. v. Meyling*, *supra*, 146 F.3d at 1192, 1193 ("[P]revarication alone is legally insufficient to actuate rescission. If the contrary were true, a materiality requirement would have no meaning."); *Thompson v. Occidental Life Ins. Co.*, 9 Cal.3d 904, 916 (1973).

Allmerica charged a premium of $.21 per $1,000 of life coverage under the policy, resulting in a gross premium to Credence for the group life coverage of $134,878 per year. (ER 191.) The difference in the premium paid by Credence between a benefit for Charles' beneficiaries of $170,000 and $480,000, would have been $781, approximately one-half of one percent of the total premium paid for the group policy. (ER 108-109, ¶ 6.) The trier of fact could reasonably have determined such a tiny difference in premium to be de minimis and, accordingly, immaterial in the face of a $135,000 premium for the group policy.[8]

---

[8] Allmerica submitted a declaration from Nicholas P. Titone, which stated that the difference in Charles' annual earnings "would materially affect Allmerica's calculation of premiums charged for the policy." (ER 79, ¶ 9.) Mr. Titone's statement was an inadmissible conclusion invading the trier of fact's discretion to decide what is and what is not material, to which Everhart objected under Fed.R.Civ.P. 56(e). (ER 101, fn. 5.) Moreover, the trier of fact was not required to believe such "'post mortem' testimony" of the insurer's state of mind. *Thompson*, 9 Cal.3d at 916.

Given Mr. Titone's statement, Allmerica should have been subjected to discovery concerning its underwriting practices, premium calculations, internal standards for determining "materiality" of economic information used for group life policies, and the like, none of which had been accomplished at the early stage of the proceedings that Allmerica's summary judgment motion was brought. This objection was raised to the district court (ER 101, fn. 5), and would have compelled denial of

Third, Allmerica disregards that the policy specifies a remedy for any allegedly overpaid benefits. The policy provides that "[t]he monthly premium due on each premium due date will be the sum of the amounts for each of the benefits provided in the policy." (ER 200.) Allmerica correctly asserts that it was Credence, the policyholder, that was responsible for reporting the correct amount of earnings of each employee, including Charles. (Allmerica Brief, 28-29; see ER 198.) The policy provides:

> "If the Company [Allmerica] pays claims that it would not have paid had the information been correctly provided, the Policyholder [Credence] shall reimburse the Company for any and all claims paid in error." (ER 198.)

Thus, Allmerica has a mandatory, self-executing remedy in the policy against Credence for either additional premium due for the amount of coverage actually provided or for any purported overpayment of benefits due to Credence's failure properly to report Charles' earnings. With such "an automatic compensation mechanism" provided in the policy, Allmerica would not be allowed to rescind the coverage and benefits payable to Everhart regardless of any misrepresentation by Charles. *Security Life Insur. Co. v. Meyling*, supra, 146 F.3d at 1192. Finally, Allmerica also asserts that its denial of the full amount of insurance benefits claimed by Everhart must be reviewed under an "abuse of discretion" standard. (Allmerica Brief, 29-30.) The "abuse of discretion" standard applies to discretion exercised by a plan administrator. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Taft v. Equitable Life Assur. Society*, 9 F.3d 1469, 1471 (9th Cir. 1994). Allmerica is not the plan administrator here, and conceded as much in the district

---

Allmerica's motion, so far as it relied upon Mr. Titone's declaration, until that discovery had been taken. Fed.R.Civ.P. 56(f).

court. (ER 70, n. 4.) Credence was the plan administrator. There is no legal basis for Allmerica to claim that it is entitled to the benefit of any deference by the courts to its coverage decisions, or that those decisions must be reviewed under an abuse of discretion standard.

To the extent that the court might believe that Allmerica is entitled to such an abuse of discretion review, the record demonstrates a triable factual dispute over whether Allmerica did abuse its discretion in refusing to pay Everhart the full amount of benefits under the life insurance policy. Discretion is abused where the insurer "'construe[s] provisions of the plan in a way that clearly conflicts with the plain language of the plan.'" *Taft v. Equitable Life Assur. Society*, supra, 9 F.3d at 1472. The plain language of the plan provides a death benefit of "[t]wo times basic annual earnings." (ER 15.) "Basic annual earnings" is expressly defined as "annual earnings" including "bonuses and commissions." (ER 20.) Allmerica seeks not to enforce the plain language of the plan, but to pay a different amount than the promised benefit. Under *Taft*, Allmerica's action is a clear abuse of discretion.[9]

Allmerica was not entitled to summary judgment on grounds of fraud.

---

[9] At the very least, Everhart should have had the opportunity to conduct discovery on Allmerica's exercise of "discretion" before the district court could consider any dispositive motion on whether that discretion was abused.

CONCLUSION

The district court erroneously granted Allmerica summary judgment on grounds that Allmerica, as the Credence employee benefit plan's insurer, was not a proper party defendant on a benefits claim under ERISA, 29 U.S.C. § 1132(a)(1)(B). Neither of the other grounds asserted by Allmerica in its brief would justify summary judgment. The judgment should be reversed.

Dated: March 8, 2000

Respectfully submitted,

LAW OFFICES OF CHARLES J. WISCH

/s/ Charles J. Wisch
CHARLES J. WISCH

Attorneys for Plaintiff and Appellant Lyn Everhart

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points, and contains 4973 words by word processor count, not including the cover, tables of contents or authorities, certificate of service, or this certificate of compliance.

Dated: March 8, 2000

LAW OFFICES OF CHARLES J. WISCH

/s/ Charles J. Wisch
CHARLES J. WISCH

Attorneys for Plaintiff and Appellant Lyn Everhart

PROOF OF SERVICE

I am employed in the City and County of San Francisco, that I am over the age of eighteen (18) years, and am not a party to the within cause, and that my business address is 655 Montgomery Street, 12th Floor, San Francisco, California 94111.

I am readily familiar with the business' practice for the collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

On March 8, 2000, at San Francisco, California, I served the within:

APPELLANT'S REPLY BRIEF

by placing [a] true copy[ies] in a sealed envelope, which envelope was then placed for collection and mailing on said date following ordinary business practices, addressed as follows:

Paul E. B. Glad, Esq.
Sonnenschein Nath & Rosenthal
685 Market Street, 10th Floor
San Francisco, CA 94105

United States District Court
450 Golden Gate Avenue
16th Floor, Suite 1111
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: March 8, 2000

Cathryn Waters
Legal Assistant